DOCKET NO. NNH-CV15-6054684-S	:	CONNECTICUT SUPERIOR COURT
CRYSTAL HORROCKS, ET AL	:	JUDICIAL DISTRICT OF NEW HAVEN
v.	:	AT NEW HAVEN
KEEPERS, INC., ET AL	:	JULY 19, 2019

PRELIMINARY APPLICATION TO CONFIRM ARBITRATION AWARD

Plaintiffs Crystal Horrocks, et al, seek a preliminary order confirming a certain arbitration award involving matters between the Plaintiffs and Defendant Keepers, Inc. and Defendant Joseph Regensburger.

Plaintiffs filed this complaint May 18, 2015. Defendants filed a motion to dismiss or in the alternative a motion to stay the proceedings pending arbitration May 26, 2015 (101.00). Defendants filed all the salient arbitration agreements with the court as part of the motion to dismiss.

After briefing and oral argument, Judge Wilson granted the motion to stay the proceedings and sent the case to arbitration October 13, 2015 (104.00).

On November 10, 2016, with this case still not having been placed into arbitration, Plaintiffs filed an Application to Proceed with Arbitration that Judge Abrams granted (111.10) about two weeks later.

Parties agreed on Judge (Ret.) Robert Holzberg as an arbitrator, and he bifurcated the case into hearings in liability and if needed, damages. After two days of testimony (May 1 and May 23, 2019) on the question of whether or not plaintiffs were employees or independent contractors, Judge Holzberg ruled in favor of Plaintiffs as to liability only July 18, 2019, holding

ORAL ARGUMENT REQUESTED
NO TESTIMONY REQUIRED

that Plaintiffs were indeed employees. A true and correct copy of this ruling is attached herein as exhibit 1.

On a parallel track, this court issued notice April 17, 2019 that the case had not been prosecuted with due diligence, and scheduled it for dismissal. On June 4, 2019, Plaintiffs asked for an extension of the dismissal date, since a decision on the merits was pending. Judge Abrams granted (113.10) the continuance until August 1, 2019. This motion is in part response to that, seeking a continuance of dormancy dismissal because this case remains in active prosecution in arbitration.

Parties will schedule a second hearing on damages in the near future, and it is possible that this court may wait until Judge Holzberg issues his ruling on damages to confirm the entire arbitration award.

But, given the pending issues with the dormancy docket, Plaintiffs herein move this court to confirm this award as to liability only, or, stay the dormancy dismissal herein pending a complete and final judgment in the arbitration as to the damages portion of this case.

Wherefore, the Plaintiffs pray:

1) That this award as to liability only be confirmed.
2) That an order be issued directing the defendants to appear on a day certain to show cause, if any be there, why this application should not be granted.
3) Or, that an order be issued staying the dormancy dismissal of this case until the damages hearing is complete and a final judgment from arbitration has entered.

Dated at Hartford, CT, July 19, 2019.

PLAINTIFF,

BY:

_____/s/_____

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PROPOSED ORDER

Upon the foregoing Application seeking confirmation of the arbitrators' award referred to therein, it is hereby ordered that a hearing on the application be held before this court at the courthouse in New Haven on _____ 2019 at _____ a.m./p.m. and that the Defendants to having filed a written appearance in the above-captioned matter and having appeared to defend the claims set forth in the above captioned matter appear at that time and place, then there to show cause, if any there be, why the application should not be granted.

Dated at New Haven, Connecticut, this ___ day of _____, 2019.

BY THE COURT (, J.)

_____
Judge/Clerk/Assistant Clerk

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was emailed or mailed, via First Class Postage of the United States Postal Service on this 19th day of July, 2019 to:

Pellegrino Law Firm
475 Whitney Avenue
New Haven, CT 06511

_____/s/_____
Kenneth J. Krayeske, Esq.

EXHIBIT 1

DOCKET NO. NNH-CV-15-6054684-S	SUPERIOR COURT
CRYSTAL HORROCKS, ET AL	J.D. OF NEW HAVEN
VS.	AT ARBITRATION
KEEPERS, INC. ET AL	JULY 18, 2019

ARBITRATION AWARD

The issues in this Arbitration are set forth in the parties' Submission to Binding Arbitration, dated November 10, 2016, and approved by the court (*James Wilson Abrams, J.*) on November 29, 2016. The crux of the dispute between the parties is whether the plaintiffs are independent contractors or employees, subject to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.* and Connecticut Labor Law, Connecticut General Statutes § 31-58, *et seq.* Extensive evidence, including the testimony of five of the plaintiffs and the defendants' representatives, was presented by the parties to the undersigned. In addition, counsel have submitted very thorough legal memoranda.

The plaintiffs argue that they are employees. In support of this position, they rely on Hart v. Rick's Cabaret Intern., Inc., 967 F. Supp. 2d 901 (2013), in which the United States District Court for the Southern District of New York determined that exotic dancers at an adult entertainment club were employees under the FLSA and the New York Labor Law (NYLL), § 190 *et seq.* & § 650 *et seq.* The plaintiffs additionally contend that under Connecticut's "ABC Test," as set forth in Standard Oil of Connecticut, Inc. v. Administrator, Unemployment Compensation Act, 320 Conn. 611

(2016), the level of control that the defendants exerted over the plaintiffs compels a finding that the plaintiffs are employees, and not independent contractors.

The defendants, by contrast, argue that the plaintiffs are independent contractors, and not employees. They rely on the express language in the parties' written agreement, which states explicitly that they are independent contractors and not employees. The defendants further argue that because the written contract is unambiguous, the Arbitrator cannot look to parole evidence. To the extent that the Arbitrator does look outside the four corners of the contract, the defendants alternatively argue that they do not exercise sufficient control over the plaintiffs to require a finding of an employer/employee relationship. They contend that Keepers is not an exotic dance club *per se*, but rather is a bar that happens to have dancers, and argue that the dancers are not integral to their business.

For the reasons that follow, I conclude that the plaintiffs are employees, and not independent contractors, and are thus subject to the FLSA and Connecticut law.

A. The Language in the Parties' Contract

At the outset, the defendants' argument that the terms of the parties' contract controls, and that the Arbitrator cannot look to parole evidence, is unavailing. See Latimer v. Administrator, Unemployment Compensation Act, 216 Conn. 237, 251–52 (1990) ("Language in a contract that characterizes an individual as an independent contractor [rather than an employee] is not controlling. The primary concern is what is done under the contract and not what it says. Such provisions in a contract are not effective to keep an employer outside the purview of the act when the established facts

bring him within it. 'We look beyond the plain language of the contract to the actual status in which the parties are placed.'" (internal citations omitted)).

Accordingly, the Arbitrator must consider all of the relevant testimony and documentary evidence to determine whether the plaintiffs are employees or independent contractors.

B. Hart v. Rick's Cabaret Intern., Inc.

The facts of Hart v. Rick's Cabaret Intern., Inc., *supra*, are nearly identical to the facts of the present case. In that matter, the plaintiffs were dancers working at an adult entertainment club, and despite the fact that the club had always classified the dancers as independent contractors, the dancers argued that they should in fact be considered employees. As in the present case, the club did not pay the dancers a salary, and instead the dancers received money from customers for personal dances and for entertaining customers in semi-private rooms. From the money that the dancers received from customers they were required to pay a house fee and a tip-out fee to the DJ. Although the dancers provided their own wardrobes, there were certain rules that the dancers were required to follow, and they would be fined for violation of the rules. Specifically, the dancers were required to work an entire eight hour shift, to clock in and out upon arrival and exit, to check-in with the DJ upon arrival to be put on the rotation, and were prohibited from leaving the club with a customer.

In determining whether the plaintiffs were independent contractors or employees, the Rick's Cabaret court looked to the FLSA's "Economic Realities Test." The essential elements of that test are: (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the

business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

Based on the above facts, and others, the Rick's Cabaret court first determined that the club had "significant control over the dancers;" id. at 916; and that "the factor of control weighs overwhelmingly in favor of a finding that the dancers were employees, not independent contractors, under the FLSA." Id. at 919. Next, the court looked to the second factor and compared the relative investments of the club and the dancers, and found that the club "exercised a high degree of control over a dancer's opportunity for profit" and, thus, the dancers were more akin to wage earners than to independent entrepreneurs. Id. at 920.

In regard to the third factor, the degree of skill and independent initiative required, the Rick's Cabaret court held that there was limited genuine skill required to be an exotic dancer. Id. Although the court determined that the fourth factor, the permanency and duration of the employment relationship, favored a finding that the dancers were independent contractors and employees, the court also found that this factor was outweighed by the other factors. Id. at 921. Finally, as to the fifth factor, the court unequivocally rejected the club's argument that the dancers were not integral to the club, and instead found that this factor weighed in favor of a finding that the dancers were employees. Id.

Based on a totality of these factors, the court determined that the dancers were employees and not independent contractors. Id. at 922. The court further noted that it was not the first court to address whether dancers at a strip club are employees under

the FLSA, and stated that "[n]early '[w]ithout exception, these courts have found an employment relationship and required the nightclub to pay its dancers a minimum wage.'" Id. at 912 (quoting Harrell v. Diamond A Entm't, Inc., 992 F. Supp. 1343, 1348 (M.D. Fla. 1997).

The facts of the present case require the same conclusion: that the plaintiffs are employees under the FLSA. Although there are certainly some differences between the present case and Rick's Cabaret—i.e., the dancers at Rick's were strippers and the plaintiffs are dancers who do not remove their clothes, the dancers at Rick's were required to work a minimum of three days per week and the dancers at Rick's had mandatory monthly meetings—those differences are not sufficient to distinguish the present case from the Rick's Cabaret court's analysis. As set forth above, the facts of Rick's Cabaret and the present case are nearly identical. There is no compelling reason to depart from the rationale set forth in Rick's Cabaret.

Specifically, the application of the following factors to the evidence presented in this case demonstrates that the plaintiffs here meet the FLSA five-part test:

(1) Keepers exercises a substantial degree of control over the plaintiffs. The plaintiffs must follow certain rules and are subject to a fine for violating the rules. They must clock-in and clock-out and must check-in with the DJ who then determines their rotation. They must pay a portion of their nightly tips to the DJ and are fined for missing a shift or leaving early or arriving late to their shift. The plaintiffs must also follow a certain dress code, may not leave with customers and may not spend downtime in the dressing room. Violation of these rules may result in fines, suspension from work,

and in some cases, confiscation of a dancer's driver's license as collateral for payment of fines.

(2) The plaintiffs have minimal opportunity for profit or loss or investment in their business. Although it is undisputed that the plaintiffs can earn more money through personal dances and/or entertaining customers in the VIP room, the plaintiffs are required to participate in specified stage rotations. They are also required to work on a less busy weekday in order to work on the more desirable weekend. The defendants also set and impose the minimum costs for personal dances and VIP room use, and take a portion of the plaintiffs' nightly income.

(3) The plaintiffs' services require limited skill and independent initiative. As the Rick Cabaret's court and others have held there is limited genuine skill required to be an exotic dancer. See Rick's Cabaret Intern., Inc., 967 F. Supp. At 920.

(4) The plaintiffs' employment relationship with the defendants is not permanent, and this factor weighs slightly in favor of the defendants. Although the plaintiffs were permitted to make their own schedule, and could work as often as they pleased, the plaintiffs were also required to work on a slow night in order to have the opportunity to also work on a busier night. There was also conflicting testimony as to whether the plaintiffs were free to work at competing establishments. This factor weighs in favor of the defendants, but does not carry significant weight when compared to the other factors.

(5) Finally, the plaintiffs are integral to the defendants' businesses. Although the defendants contend that the plaintiffs are not integral to their business, and, rather, that Keepers is a sports bar that happens to have dancers, this argument is

not persuasive. The same argument was rejected in Rick's Cabaret. Id. at 921. In this case, the evidence powerfully demonstrates that dancing is an essential part of the defendants' businesses.

C. **Analysis Under the Connecticut ABC Test**

While it is not necessary to determine the application of the ABC test in light of the findings under the FLSA, for the sake of clarity and completeness, I will also consider whether the plaintiffs are employees under Connecticut law. The ABC test provides the primary analyses to determine whether an individual is an employee or independent contractor in Connecticut. The test is embodied in subdivisions (I), (II) and (III) of Connecticut General Statutes § 31–222(a)(1)(B)(ii), and consists of three parts. To avoid an employment relationship the objecting-employer must show that the services at issue are performed: (a) free from control or direction of the employing enterprise; (b) outside the usual course of the business, or outside of all the places of business, of the enterprise and (c) part of an independently established trade, occupation, profession or business of the worker. See Standard Oil of Connecticut, Inc. v. Administrator, Unemployment Compensation Act, 320 Conn. 611 (2016). "The test is conjunctive; all parts must be satisfied to exclude an employer from the Act." Latimer v. Adm'r, Unemployment Comp. Act, 216 Conn. 237, 247 (1990).

Comparing the facts of the present case to the factors of the ABC test, it is apparent that the plaintiffs are employees and not independent contractors. As discussed above, the defendants exercise significant control over the plaintiffs. Indeed, the plaintiffs must follow certain rules, must pay fines for violating those rules, must clock-in and clock-out at certain times, must pay a fee to the DJ, must follow a dress

code, must participate in stage rotations, cannot remain in the dressing room in between rotations and cannot leave with a customer. The plaintiffs are further fined for missing a shift and for leaving early or arriving late to a shift. Because the prongs of the ABC test are conjunctive, the inability of Keepers to satisfy the first prong of the test necessarily results in a conclusion that an employer-employee relationship exists. Accordingly, this factor alone is fatal to the defendants' claim that the plaintiffs are independent contractors.

Nevertheless, the remaining factors also weigh in favor of a finding that the plaintiffs are employees and not independent contractors. Although there was conflicting testimony as to whether the plaintiffs were permitted to perform their services outside of Keepers, the Arbitrator finds that the more credible evidence is that the plaintiffs were not permitted to do so and thus the defendants cannot satisfy the second factor of the ABC test. Finally, in regard to the third factor of the test, the plaintiffs were not engaged in an independently established trade, occupation, profession or business. As the Rick's Cabaret court found, exotic dancing is not a specialized skill. Moreover, the dancers require no licensure; they do not hold themselves out as an independent business through business cards, printed invoices, or advertising; they do not have a place of business separate from Keepers; they do not have a capital investment in an independent business; they do not handle their own liability insurance; they do not perform their services under their own name; they cannot employ or subcontract others; they do not have a saleable business; they do not perform their services for more than one entity, and their services do not affect their own goodwill rather than the defendants. See Sw. Appraisal Grp., LLC v. Adm'r, Unemployment Comp. Act, 324

Conn. 822, 839–40 (2017) (setting forth the elements that should be considered in deciding factor C of the ABC test).

The defendants have the burden of showing that the plaintiffs are independent contractors, and not employees, under the ABC test. See Latimer, 216 Conn. at 247. As the defendants have failed to satisfy this burden, I conclude that the plaintiffs are, accordingly, employees under Connecticut law.

D. Conclusion

The plaintiffs have met their burden of proof that they are employees under both the FLSA and the ABC test. Accordingly, a plaintiff's award will enter as to liability only. The parties agreed that damages will be assessed following this liability determination.

SO ORDERED.

Robert L. Holzberg, Judge (Ret.)
Arbitrator
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